

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

LUIS LERMA, an Individual and  
NICK PEARSON, an Individual  
On Behalf of Themselves and All  
Others Similarly Situated,

V

## Plaintiffs,

SCHIFF NUTRITION  
INTERNATIONAL, INC., a  
Delaware Corporation and  
SCHIFF NUTRITION GROUP,  
INC., a Utah Corporation,

## Defendants.

CASE NO. 11cv1056-MDD

ORDER OF PRELIMINARY  
APPROVAL OF CLASS  
SETTLEMENT

[ECF NO. 81]

Before this court is Plaintiff's unopposed motion for preliminary approval of class settlement and provisional class certification pursuant to Fed. R. Civ. P. 23.

## BACKGROUND

On May 13, 2011, Plaintiffs Luis Lerma, on behalf of himself and all others similarly situated, initiated this action by filing a class action Complaint against Defendants, Schiff International, Inc., a Utah Corporation and Schiff Nutrition Group, Inc., a Utah Corporation (ECF

1 No. 1)<sup>1</sup>. On March 12, 2012, Plaintiff filed a Third Amended Complaint  
2 (“TAC”) incorporating Plaintiff Pearson and his claims against  
3 Defendants<sup>2</sup>. (ECF No. 33). Plaintiffs alleged that Defendants violated  
4 the Consumers Legal Remedies Act, Civil Code § 1750, et seq.; Unfair  
5 Competition Law, Business and Professions Code § 17200 et seq.; Illinois  
6 Consumer Fraud Act, 502/1, et seq.; personal injuries/medical  
7 monitoring; personal injuries/negligence; and breach of express warranty.  
8 (*Id.* at 33).

9 On March 28, 2012, Defendant Schiff Nutrition International, Inc.  
10 filed an Answer to the TAC. (ECF No. 37). On February 14, 2012, the  
11 court issued the first Fed. R. Civ. P. 26 scheduling order in the case and  
12 discovery commenced. (ECF No. 29).

13 In the fall of 2013, the parties informally notified the court that a  
14 settlement in principle had been reached. On March 28, 2014, the  
15 parties consented to the jurisdiction of this court for all purposes. (ECF  
16 No. 84).

17 On March 25, 2014, Plaintiffs filed the Unopposed Motion for  
18 Preliminary Approval of Class Action Settlement and Certification of  
19 Settlement Class, accompanied by the declaration of Plaintiffs’ counsel  
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24 <sup>1</sup> The designation ECF denotes “Electronic Filing” and refers to this court’s docket sheet  
25 and the enumerated documents listed therein for this case. Specific page numbers parallel the  
ECF designation and do not necessarily sync with the page numbers found in the original  
document.

26 <sup>2</sup> “On December 15, 2011, Plaintiff Pearson filed a Class Action Complaint in the  
27 Northern District of Illinois against Defendants, Pearson v. Schiff Nutritional Int’l, et al.,  
1:11cv08914 (N.D. Ill.) . . . alleging similar claims to the Lerma Action . . . On February 27, 2012,  
28 Plaintiff Pearson voluntarily dismissed his Complaint. . . . [A]fter meeting and conferring with  
Defendants, Plaintiff Lerma prepared a Third Amended Complaint incorporating Plaintiff  
Pearson and his claims against Defendants.” (ECF No. 33, at 2).

1 and several exhibits.<sup>3</sup> (ECF No. 81). Plaintiffs request the court enter an  
2 order that: (1) preliminarily approves the terms of the Settlement; (2)  
3 approves the Notice Plan as set forth in pleadings; (3) schedule a final  
4 Fairness Hearing; (4) conditionally certify the Class for settlement  
5 purposes; (5) conditionally appoint Plaintiffs Lerma and Pearson as Class  
6 Representatives; (6) conditionally appoint Elaine A. Ryan; Stewart M.  
7 Weltman, and Jeffrey Carton as Class Counsel.

8 A hearing on Plaintiffs' unopposed motion for preliminary approval  
9 of class settlement was held on July 10, 2014. After hearing from  
10 counsel, the court issued an order granting Plaintiffs an opportunity to  
11 file an amended motion for preliminary approval of class settlement.  
12 (ECF No. 100). On September 15, 2014, Plaintiffs filed a supplemental  
13 brief re: Plaintiffs' motion for preliminary approval of class settlement.  
14 (ECF. No. 107). Also filed on September 15, 2014, was Defendants  
15 response in support of Plaintiffs' motion. (ECF. No. 108).

## 16                   TERMS OF PROPOSED SETTLEMENT

17                   The proposed settlement class (the "Class") consists of "[a]ll  
18 residents of the United States who purchased for personal use, and not  
19 resale or distribution, a Covered Product between January 1, 2005, and  
20 the Preliminary Approval Date . . . ." (ECF No. 81 at 3). Class members  
21 do not include "Schiff and its respective affiliates, employees, officers,  
22 directors, agents, and representatives and their immediate family  
23 members; Settlement Class Counsel; and the judges who have presided  
24 over the Litigation and their immediate family members." (*Id.* at 4).

### 25                   I.        Class Benefits

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27                   <sup>3</sup> Plaintiff submits the following exhibits: (1) Settlement Agreement and Release (Exh.  
1); (2) proposed Postal Notice (Exh. 1-A); Expert Report of Dr. Thomas Schnitzer, M.D. (Exh.3);  
28 Lawyer Resumes (Exh 4); Declaration of Claims Administrator (Exh. 5); Settlement Notice Plan  
(2nd Exh. 1); Vita of KCC Legal Notification Service team (Attachment A); proposed Summary  
Notice (Attachment B).

1           1. Monetary Relief

2           Defendants will create a \$2 million fund to be paid to Settlement  
3 Class Members who make valid claims. (*Id.*). “Settlement Class  
4 Members who have adequate Proof of Purchase<sup>4</sup> shall be entitled to  
5 reimbursement of \$10 for each purchased bottle of the Covered Products  
6 up to five (5) bottles per household.” (P’s Supplemental Mem., ECF No.  
7 107 at 14). “Settlement Class Members who do not have any adequate  
8 proof of purchase will be entitled to reimbursement of \$3 per bottle of the  
9 Covered Products purchased up to a maximum of four (4) bottles per  
10 household.” (ECF No. 81 at 4). “There is no ceiling on the amount of  
11 monies that Defendants may have to pay for Valid Claims. Defendants  
12 have agreed to pay all Valid Claims.” (*Id.*). In the event that the total  
13 value of Valid Claims do not reach \$2 million, the payment to each  
14 Settlement Class Member who submits a Valid Claim with Adequate  
15 Proof of Purchase shall be increased pro rata up to a maximum of triple  
16 of what he or she would be entitled to under the Settlement Agreement.”  
17 (*Id.* at 5). “If, after that increase, the total payments still do not reach \$2  
18 million, then the payment to each Settlement Class Member who submits  
19 a valid claim without Adequate Proof of Purchase shall be increased pro  
20 rata up to a maximum of double what he or she would be entitled to  
21 under the Settlement Agreement.” (*Id.*) After these increases “any  
22 residual amounts up to \$2 million will be divided pro rata among the  
23 Settlement Class Members who have submitted Valid Claims.” (*Id.*).

24           2. Injunctive Relief

25           Defendants have “agreed to the removal of certain labeling claims  
26 from all of the Covered Products currently being manufactured or sold by

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27           28           <sup>4</sup>“e.g. receipts, intact boxes or bottles that display a readable UPC code and readable lot  
number, or similar documentation that identifies the Covered Product and date and location of  
purchase.” (*Id.*).

1 Defendants.” (*Id.* at 5). “[F]or a period of twenty four (24) months  
2 commencing six (6) months after the Effective Date, Defendants will not  
3 make the following statements in the packaging or marketing of the  
4 Covered Products: ‘repair joints,’ ‘repair cartilage,’ ‘rebuild joints,’  
5 ‘rejuvenate joints,’ or ‘rejuvenate cartilage.’” (*Id.*). If the labeling changes  
6 are kept in place by Defendants beyond the 24-month period “no  
7 Settlement Class Member who purchases such product after the 24-  
8 month period can sue Defendants on any claim that was or could have  
9 been asserted in the litigation.” (*Id.*). “[I]f subsequent to the Effective  
10 Date, Defendants possess and rely upon an independent, well-conducted,  
11 published clinical trial that substantiates the representations.” (*Id.*).

12       II. Incentive Awards to Class Representatives

13       Plaintiffs Luis Lerma and Nick Pearson shall be provisionally  
14 appointed as the Class Representatives to implement the Parties  
15 proposed Settlement in accordance with the Settlement Agreement.  
16 Plaintiffs’ Counsel Bonnett, Fairbourn, Friedman & Balint, P.C., Stewart  
17 M. Weltman LLC and Denlea & Carton are appointed as Class Counsel.  
18 Plaintiffs and Class Counsel must fairly and adequately protect the  
19 Class’ interests.

20       Defendants have agreed not to oppose or cause any other person to  
21 oppose Class Counsels’ application for attorneys’ fees, costs and expenses  
22 in an amount of \$3.0 million. (*Id.* at 6).

23       The parties agree to an incentive award to the Class  
24 Representatives “not to exceed \$10,000 for the Plaintiffs.” (*Id.*). “All  
25 attorneys’ fees and expenses are to be paid separate and apart from, and  
26 will not diminish or erode, the payment of claims to Settlement Class  
27 Members. . . .” (*Id.*).

28       III. Consent Jurisdiction and Modification to Settlement

1 The Class Representatives and the Defendants have consented to  
2 jurisdiction of the United States Magistrate Judge Mitchell Dembin for  
3 all purposes in this case, pursuant to 28 U.S.C. § 636(c), including  
4 approval of the settlement and the entry of final judgment. All citations  
5 to this case in the notices and claim forms shall be as follows: *Luis*  
6 *Lerma, an Individual, and Nick Pearson, an Individual, On Behalf of*  
7 *Themselves and All Others Similarly Situated v. Schiff Nutrition*  
8 *International, Inc., a Delaware Corporation, and Schiff Nutrition Group,*  
9 *Inc., a Utah Corporation*, Case No. 3:11cv1056-MDD.

10 The court reserves the right to approve the Settlement with such  
11 modifications, if any, as may be agreed to by Class Counsel and Counsel  
12 for Defendants and without future notice to the Settlement Class  
13 Members.

## DISCUSSION

15       “Voluntary conciliation and settlement are the preferred means of  
16 disputed resolution in complex class action litigation.” *Smith v. CRST*  
17 *Van Expedited, Inc.* 2013 WL 162393, at \*2 (S.D. Cal. Jan 14,  
18 2013)(citing *Officers for Justice v. Civil Service Com’n of City and County*  
19 *of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). But because “[t]he  
20 class action device...is [] susceptible to abuse and carries with it certain  
21 inherent structural risks, ... class actions may be settled only with the  
22 approval of the district court.” *Officers for Justice*, 688 F.2d at 623; see  
23 also Fed. R. Civ. P.23(e). “[A]pproval...involves a two-step process in  
24 which the Court first determines whether a proposed class action  
25 settlement deserves preliminary approval and then, after notice is given  
26 to class members, whether final approval is warranted.” *National Rural*  
27 *Telecommunications Cooperative v. DIRECTV, Inc.*, 221 F.R.D. 523, 525  
28 (C.D. Cal. 2004).

1       Here, the court is at the preliminary approval stage. This “initial  
2 decision to approve or reject a settlement proposal is committed to the  
3 sound discretion of the trial judge.” *Officers for Justice*, 688 F.2d at 625.  
4 “Because class members will subsequently receive notice and have an  
5 opportunity to be heard on the settlement, th[e] Court need not review  
6 the settlement in detail at this juncture.” *In re M.L. Stern Overtime*  
7 *Litig.*, 2009 W.L. 995864, at \*3 (S.D. Cal. April 13, 2009). However, even  
8 at this preliminary stage, “a district court may not simply rubber stamp  
9 stipulated settlements.” *Kakani v. Oracle Corp.*, 2007 WL 1793774, at \*1  
10 (N.D.Cal. June 19, 2007) (citing *Staton v. Boeing Co.*, 327 F. 3d 938, 959-  
11 60 (9th Cir. 2003)). “Especially in the context of a case in which the  
12 parties reach a settlement by agreement prior to class certification,  
13 courts must peruse the proposed compromise to ratify both the propriety  
14 of the certification and the fairness of the settlement.” *Staton v. Boeing*,  
15 327 F.3d at 952.

16 I. Federal Rule of Civil Procedure 23(a) Requirements

17       “A party seeking to maintain a class action must be prepared to  
18 show that Rule 23(a)’s numerosity, commonality, typicality and adequacy  
19 of representation requirements have been met, *Wal-Mart Stores, Inc. v.*  
20 *Dukes*, 564 U.S. \_\_, 131 S.Ct. 2541, and must satisfy through evidentiary  
21 proof at least one or Rule 23(b)’s provisions.” *Comcast Corp. v. Behrend*,  
22 133 S.Ct. 1426, 1429 (2013) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564  
23 U.S. \_\_, 131 S.Ct. 2541 (2013)). Here, Plaintiff seeks certification of a  
24 settlement class pursuant to Fed. R. Civ. P. 23(b)(3).

25       A. Numerosity

26       First, a proposed class must be “so numerous that joinder of all  
27 members is impracticable.” Fed. R. Civ. P. 23(a)(1). “Joinder need not be  
28 impossible, as long as potential class members would suffer a strong

1 litigation hardship or inconvenience if joinder were required.” *Rannis v.*  
2 *Recchia*, 380 Fed. Appx. 646, 651 (9th Cir. May 27, 2010) (citing *Harris v.*  
3 *Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964)).

4 Here, the parties assert that “from January 1, 2005, and the  
5 Preliminary Approval Date” the covered products have been sold  
6 nationwide. (Memo of P’s and A’s ISO of Plaintiffs’ Unopposed Motion for  
7 Preliminary Approval of Class Action Settlement and Certification of  
8 Settlement Class, ECF No. 81 at 7). Accordingly, the court finds that it is  
9 reasonable to conclude “the class is so numerous that joinder of all  
10 members is impracticable.” Fed. R. Civ. P. 23(a)(1).

11       B.    Commonality

12       Commonality requires that the class claims depend upon a common  
13 contention . . . .[and] must be of such a nature that it is capable of  
14 classwide resolution . . . .” *Wal-Mart Stores, Inc. v. Dukes*, *U.S.*, 131  
15 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011). In this case, a class of  
16 similarly situated individuals alleged that Defendant violated the  
17 Consumers Legal Remedies Act, Civil Code § 1750 *et seq.*, Unfair  
18 Competition Law, Business and Professions Code § 17200 *et seq.*, Illinois  
19 Consumer Fraud Act, 502/1, *et seq.*, Personal Injuries/Medical  
20 Monitoring, Personal Injuries/Negligence, and Breach of Express  
21 Warranty, which raised the following legal issues:

- 22           \*    Whether the representations or omissions discussed herein  
23                    that Defendants made about the Covered Products were or  
24                    are misleading, or likely to deceive;
- 25           \*    Whether Plaintiffs and the Class members were deceived in  
26                    some manner by Defendants’ representations;
- 27           \*    Whether the alleged conduct constitutes violations of the  
28                    asserted herein;

- \* Whether Plaintiffs and Class members have been injured and the proper measure of their losses as a result of those injuries;
- \* Whether Plaintiffs and Class members are entitled to injunctive, declaratory or other equitable relief.

5 || (ECF. No. 81 at 9).

6 Pursuant to Rule 23(b)(3) the court finds that the allegations set  
7 forth in Plaintiffs' complaint are common to the Class Members and  
8 predominate over any individual claims, "and that a class action is  
9 superior to other available methods for fairly and efficiently adjudicating  
10 the controversy." Fed. R. Civ. P. 23(b)(3).

### C. Typicality

12 The third Rule 23(a) prerequisite is typicality of claims. “[T]he  
13 claims or defenses of the representative parties are typical of the claims  
14 or defenses of the class.” Fed. R. Civ. P. 23(a)(3). The claims of the class  
15 representatives must be “reasonably coextensive with those of absent  
16 class members.” *Hanlon v. Chrysler Corp.* , 150 F.3d 1011, 1020 (9th Cir.  
17 1998).

18 Plaintiffs allege that “the labeling and advertising of the Covered  
19 Products all misrepresented the products’ effectiveness in providing joint  
20 health benefits.” (ECF No. 81 at 10). “Plaintiffs further alleged that they  
21 and all members of the Settlement Class were injured when they paid  
22 money to purchase the Covered Products.” (*Id.*) No claim has been raised  
23 by Plaintiffs that is unique to themselves. Accordingly, the court finds  
24 the typicality prerequisite has been preliminarily satisfied.

## D. Adequacy

26 “Rule 23(a)(4) permits the certification of a class action only if the  
27 ‘representative parties will fairly and adequately protect the interests of  
28 the class.’” *Staton v. Boeing*, 327 F. 3d. at 957. “To determine whether the

1 representation meets this standard, we ask two questions: (1) Do the  
2 representative plaintiffs and their counsel have any conflicts of interest  
3 with other class members, and (2) will the representative plaintiffs and  
4 their counsel prosecute the action vigorously on behalf of the class?” *Id.*  
5 Counsel for Plaintiffs have submitted exhibits outlining Plaintiffs  
6 counsels’ experience prosecuting complex consumer actions. (See ECF  
7 No. 81-5, Exh. 4). Based upon the record before the court, it appears that  
8 neither Plaintiffs nor their counsel have any conflict of interest with any  
9 other class member. The court finds the adequacy prerequisite has been  
10 preliminarily satisfied.

11       E.     Predominance and Superiority

12       In addition to meeting all four of the Rule 23(a) prerequisites,  
13 Plaintiff must also meet one of the Rule 23(b) requirements. As  
14 previously stated, Plaintiff seeks certification pursuant to Rule 23(b)(3):  
15 (1) “the questions of law or fact common to class members predominate  
16 over any questions affecting only individual members,” and (2) “a class  
17 action is superior to other available methods for fairly and efficiently  
18 adjudicating the controversy.” *Id.*

19       Predominance concerns whether “questions of law or fact common  
20 to the class will predominate over any questions affecting only individual  
21 members as the litigation progresses.” *Amgen*, 133 S. Ct. at 1195. In  
22 Plaintiffs’ unopposed motion for preliminary approval of class settlement,  
23 Plaintiffs assert the proposed settlement satisfies the predominance  
24 requirement because “the central issues for every claimant are whether  
25 Defendants’ claims that the Covered Products provided clinically proven  
26 joint health benefits were false or deceptive and whether Defendants  
27 alleged misrepresentations regarding the effectiveness of the Covered  
28 Products was likely to deceive a reasonable consumer.” (ECF No. 81-1 at

1 21). “These issues predominate and are together the ‘heart of the  
2 litigation’ because they would be decided in every trial brought by  
3 individual members of the Settlement Class and can be proven or  
4 disproven with the same class-wide evidence.” (*Id.*).

5 On these facts, the court finds that the Rule 23(b)(3) predominance  
6 requirement has been preliminarily established.

7 The court must next consider whether “a class action [would be]  
8 ‘superior to other available methods for fairly and efficiently adjudicating  
9 the controversy.’” *Colin v. Jaguar Land Rover North America, LLC*, 619  
10 F.3d 1168, 1175 (9th Cir. 2010) (quoting Fed. R. Civ. P. 23(b)(3))).  
11 Whether class certification is the superior method for adjudicating class  
12 members’ claims, the four factors enumerated in Rule 23(b)(3) must be  
13 considered: (a) the class members interests in controlling litigation, (b)  
14 the nature of litigation, (c) the desirability of concentrating the litigation  
15 of the claims, and, (3) the manageability of the class. “[Consideration of  
16 these factors requires the court to focus on the efficiency and economy  
17 elements of the class action so that cases allowed under subdivision (b)(3)  
18 are those that can be adjudicated most profitably on a representative  
19 basis.” *Zinser v. Accujix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th  
20 Cir. 2001).

21 In this case, the relatively small amount of money involved and the  
22 expense associated with each class member prosecuting a separate case  
23 makes it highly unlikely that individual litigation would be undertaken.  
24 “Where damages suffered by each putative class member are not large,  
25 this factor weighs in favor of certifying a class action.” See *Id.* at 1190. A  
26 class action would offer those with small claims the opportunity for  
27 meaningful redress. Here, the court finds that the Rule 23(b)(3)  
28 superiority requirement has been preliminarily established.

1       The court grants preliminary certification of the proposed  
2 settlement class.

3           F. Fairness of the Proposed Settlement

4       The court must carefully consider “whether a proposed settlement  
5 is fundamentally fair, adequate, and reasonable,” understanding that  
6 “[i]t is the settlement taken as a whole, rather than the individual  
7 component parts, that must be examined for overall fairness....” *Staton v.*  
8 *Boeing Company*, 327 F.3d 938, 952 (9th Cir. 2003) (internal citations  
9 omitted). “In making this appraisal, courts have broad discretion to  
10 consider a range of factors such as ‘the strength of the plaintiffs’ case; the  
11 risk, expense, complexity, and likely duration of further litigation; the  
12 risk of maintaining a class action status throughout the trial; the amount  
13 offered in settlement; the extent of discovery completed and the stage of  
14 the proceedings; the experience and views of counsel; the presence of a  
15 governmental participant; and the reaction of the class members to the  
16 proposed settlement.” *Id.* at 959 (internal citations omitted). “The  
17 relative importance to be attached to any factor will depend upon and be  
18 dictated by the nature of the claim(s) advanced, the type(s) of relief  
19 sought, and the unique facts and circumstances presented by each  
20 individual case.” *Officers for Justice v. Civil Service Commission of San*  
21 *Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

22       “The first step in district court review of a class action settlement is  
23 a preliminary, pre-notification hearing to determine whether the  
24 proposed settlement is ‘within the range of possible approval.’” *Gautreaux*  
25 *v. Pierce*, 690 F. 2d 616, 621 ftnt 3 (7th Cir. 1982). The purpose of Rule  
26 23(e) is to protect the unnamed members of the class from unjust or  
27 unfair settlements affecting their rights. *See Davis v. City and County of*  
28 *San Francisco*, 890 F.2d 1438, 1444 n. 5 (9th Cir. 1989).

1       At this juncture, Plaintiff's counsel has sufficiently demonstrated  
2 that the procedure for reaching this settlement was fair and reasonable.  
3 Weighing all the factors in favor of preliminary approval, the court finds  
4 the settlement is within the range of possible approval. This preliminary  
5 determination establishes an initial presumption of fairness. *See In re*  
6 *General Motors Corp. Pick-up Truck Fuel Tank Products Liability*  
7 *Litigation*, 55 F.3d 768, 785 (3rd Cir. 1995).

8       II. Notice

9       The Notice of Class Action Settlement will be provided through the  
10 following methods:

11       A. “[The proposed] Notice Plan uses a combination of notice  
12 placements in well-read consumer publications and on a variety of  
13 websites to effectively reach Class members. To fulfill the CLRA  
14 (California Consumer Legal Remedies Act) notice requirement, the notice  
15 program also includes four placements, once a week for four consecutive  
16 weeks in San Diego Union Tribune.” (ECF No. 81-6, at 25).

17       B. Notices will be placed in the seven following publications:

18                   Arthritis Today	Prevention
19                   First for Women	Reader's Digest
20                   Parade	Woman's World
21                   People	

22       C. Notices will be placed on the following internet networks:

23                   Google Display	Google Search
24                   Microsoft Display	Yahoo! RMX
25                   Facebook	

26       D. “An informational website will be established . . . . The website  
27 address will be prominently displayed in all printed notice materials and  
28 accessible through a hyperlink embedded in the internet banner notices.”

1 (Id. at 26).

2       E. “A toll-free number will be established to allow a simple way for  
3 Class members to learn more about the settlement in the form of  
4 frequently asked questions and answers and to request to have more  
5 information mailed directly to them. The toll-free number will be  
6 prominently displayed in all printed materials.” (Id.).

7       F. A Facebook webpage will be established enabling Class  
8 members to learn more about the class action settlement. (Id. at 35).

9       III. Right to Elect Not to Participate in Settlement

10       “A member of the Settlement Class who wishes to opt-out of the  
11 Settlement Class must complete and send to the Settlement  
12 Administrator a request for exclusion that is post-marked or submitted  
13 electronically not later than the Opt-Out and Objection Date. The  
14 request for exclusion must be personally signed by the member of the  
15 Settlement Class and contain a statement that he or she is otherwise a  
16 member of the Settlement Class and purchased one or more of the  
17 Covered Products. A member of the Settlement Class may opt-out on an  
18 individual basis only. So-called “mass” or “class” opt-outs whether filed  
19 by third parties on behalf of a “mass” or “class” of class members or  
20 multiple class members where no personal statement has been signed by  
21 each and every individual class member, shall not be allowed.” (ECF No.  
22 107-12, at 19). A Class Member who desires to be excluded but who fails  
23 to comply with the opt-out procedure shall not be excluded from the class.  
24 (Id.). “The Settlement Administrator shall provide Settlement Class  
25 Counsel and Defendants’ Counsel with the Opt-Out List within (7) Days  
26 after the Opt-Out and Objection Date.” (Id.).

27       IV. Right to Object

28       Any Settlement Class Member who does not opt-out and who

1 wishes to object to the Settlement “must do so on or before the Opt-Out  
2 and Objection Date.” (*Id.* at 18). To be considered valid the objection  
3 must be submitted to the court and served on Settlement Class Counsel  
4 and Defendant’s Counsel. An objection must provide: (a) the name,  
5 address, telephone number of the person objecting and, if represented by  
6 counsel, of his/her counsel; (b) a signed declaration that he or she is a  
7 member of the Settlement Class and purchased one or more of the  
8 Covered Products; (c) a statement of all objections to the Settlement; and  
9 (d) a statement whether he or she intends to appear at the fairness  
10 hearing. (*Id.*). Class members who fail to file and serve timely written  
11 objections in the manner specified above shall be deemed to have waived  
12 any objections and shall be foreclosed from making any objection to the  
13 settlement. (*Id.*).

14 The Settlement Administrator shall make available an electronic  
15 copy of this preliminary approval Order in a prominent location on the  
16 informational website. The Settlement Administrator shall include a  
17 statement, in a prominent location on the Class Notice, Publication  
18 Notice and claim forms, informing the putative class members that a  
19 copy of this Order is available on informational website.

20 In all other respects, the court finds that the proposed notice  
21 procedures are reasonably calculated to adequately apprise Class  
22 Members of (a) a pending lawsuit; (b) the proposed settlement; and (c)  
23 their rights, including the right to either participate in the settlement,  
24 exclude themselves from the settlement, or object to the settlement.

25 //

26 //

27 **V. Preliminary Injunction**

28 Defendant’s request a preliminary injunction “enjoining all

1 members of the Settlement Class from commencing or continuing any  
2 lawsuit or other proceeding relating to the Released Claims.” (ECF No.  
3 108 at 10). According to the Defendants, an injunction is appropriate  
4 under the All Writs Act, 28 U.S.C. § 1651 to keep a parallel proceeding  
5 from undermining settlement in this case. (ECF No. 108 at 12).  
6 Defendants contend that a preliminary injunction is particularly justified  
7 here because a settlement has been reached “and parallel proceedings  
8 create the risk of inconsistent decisions . . . and impair this Court’s  
9 flexibility in reviewing and approving the settlement.” (*Id.*). The parties  
10 specifically cite two other on-going federal cases in support of their  
11 request for injunctive relief: *Mitchell v. Schiff Nutrition, et al.*,  
12 3:14cv00387 (S.D. Cal.); *Flowers v. Schiff Nutrition, et al.*, 2:13cv09406  
13 (C.D. Cal.).

14 “The All Writs Act provides that: ‘The Supreme Court and all  
15 courts established by Act of Congress may issue all writs necessary or  
16 appropriate in aid of their respective jurisdictions and agreeable to the  
17 usages and principles of law.’ *Negrete v. Allianz Life Insurance Company*  
18 *of North America*, 523 F.3d 1091, 1098 (9th Cir. 2008). However, a court  
19 should not enjoin conduct under the Act that is “not shown to be  
20 detrimental to the court’s jurisdiction.” *ITT Community Development*  
21 *Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978). “[T]he mere fact  
22 that some other court might complete its proceedings before the district  
23 court [is] able to complete the proceedings in [its own] case does not  
24 justify an injunction.”<sup>5</sup> *Negrete*, 523 F.3d at 1100, ftnt 13 (citing *Vendo*  
25

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26 <sup>5</sup> “[A] district court’s injunctive power is not unfettered under the All Writs Act;  
27 rather it is circumscribed by the Anti-Injunction Act [which] generally prohibits courts  
28 from enjoining state proceedings, except for three enumerated exceptions.” *Negrete* 523  
F.3d at 1100. Although, as Defendants have noted, the only other pending cases at  
issue are in federal court, therefore, the court will not address the essentials of the Anti-  
Injunction Act.

1     *Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 641-42, 97 S.Ct. 2881, 2893, 53  
2 L.Ed.2d 1009 (1977)). In addition, “[t]here is precious little authority  
3 dealing with injunctions . . . to another federal district court.” *Negrete*,  
4 523 F.3d at 1099. In *Bergh v. Washington*, 535 F.2d 505 (9th Cir. 1976),  
5 the Ninth Circuit held:

6        [W]hen an injunction sought in one federal proceeding would  
7 interfere with another federal proceeding, considerations of  
8 comity require more than the usual measure of restraint, and  
9 such injunctions should be granted only in the most unusual  
cases. Where, as here, the [f]ederal courts are of coordinate  
jurisdiction, and their decisions are reviewed by the same  
Court of Appeals, the issuance of such an injunction is rarely,  
if ever, justified.

10     *Id.* at 507 (internal citations omitted).

11     The two Ninth Circuit cases cited by Defendants are not  
12 particularly instructive and do not support their assertion that federal  
13 district courts “routinely” and “regularly” preliminarily enjoin pending  
14 cases.” (ECF No. 108 at 10-11). Defendants cite *Wright v. Linkus*  
15 *Enterprises, Inc.*, 259 F.R.D. 468 (E.D.Cal. 2009). In its order of  
16 preliminary approval of class settlement the court in *Wright* issued an  
17 injunction pursuant to the All Writs Act recognizing that “the existence  
18 of other actions by class members for the same or similar claims could  
19 jeopardize the ability to proceed with final approval of the settlement.”  
20     *Id.* at 477.

21     Here, the court does not perceive a threat from the other pending  
22 cases that would persuade it to set aside the principles of comity and  
23 enjoin a pending action in a court of equal jurisdiction. As the court in  
24 *National Union Fire Insurance Company of Pittsburgh, PA., v. Payless*  
25 *Shoesource, Inc., et al.*, 2012 WL 3277222 (N.D. Cal), pointed out, “the  
26 limited instances in which a district court in this Circuit has enjoined  
27 [later filed cases] dealt with unusual factors that counseled in favor of  
28 enjoining the [later filed] action[s]. . . .” *Id.* at 9. See *Broadcom Corp v.*

1     *Qualcomm Inc.*, 2005 WL 5925582 (C.D.Cal. 2005) (enjoining the second-  
2     filed of three actions for patent infringement with a parallel proceeding  
3     on the same patent claims pending before the United States Trade  
4     Commission.); *Kiland v. Boston Sci. Corp.*, 2011 WL 1261130 (N.D.Cal.  
5     2011) (enjoining second-filed action in the District of Minnesota but after  
6     the district court voluntarily stayed its own proceedings in favor of the  
7     California case.).

8           Defendants also cite *Hanlon v. Chrysler*, 150 F.3d 1011 (9th Cir.  
9     1998) in support of their request for an injunction. The court in *Hanlon*  
10    invoked its authority under the All Writs Act and enjoined a state class  
11    action brought by a class member who attempted to opt out an entire  
12    state sub-class from the pending federal case. *Hanlon* was a complex  
13    mass tort litigation involving potentially 3.3 million class members with  
14    a settlement valuation of \$115 million. The instant case is not complex  
15    and while the potential pool of class members could top two million this  
16    is not a case where an injunction would aid the court's jurisdiction. Nor  
17    does the court find that the other pending federal cases are "in a position  
18    to frustrate the implementation of a court order or the proper  
19    administration of justice." *U.S. v. New York Tel. Co.*, 434 U.S. 159, 174,  
20    98 S.Ct. 364, 373 (1977).

21           As stated previously, the All Writs Act exists to avoid any threat to  
22    the court's jurisdiction that has "the practical effect of diminishing the  
23    court's power." *ITT Community Dev. Corp.*, 569 at 1359. It does not  
24    apply to a party's "continuing interest in prosecuting a lawsuit." *Sea*  
25    *Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1213 (DCC 1989). No  
26    identifiable threat to the jurisdiction of this court has been presented.  
27    Applying the limited precedent in this area, the court finds no basis for  
28    issuing an injunction in this case. Accordingly, Defendant's motion for

1 || injunctive relief pursuant to the All Writs Act is denied.

## CONCLUSION

4 IT IS HEREBY ORDERED that the Unopposed Motion for  
5 Preliminary Approval of Class Action Settlement (ECF No. 81) filed by  
6 Plaintiffs is GRANTED as follows:

1. The Amended Settlement Agreement (Pl. Exh. 13, ECF No. 107-13 at 2) including the Class Notice provisions and claim form, are preliminarily approved;
2. If the Settlement Agreement terminates by its terms for any reason, the following will occur: (a) this Order will be vacated; (b) class certification will automatically be vacated, Plaintiffs will stop functioning as class representatives and , Class Counsel will revert to interim class counsel; and (c) this Action will revert to its previous status in all respects as it existed immediately before the Parties executed the Settlement Agreement.
2. The Class is provisionally certified as a class of all persons who purchased one of the Covered Products during the period from January 1, 2005 and the date of preliminary approval;
3. Plaintiffs Lerma and Pearson are conditionally certified as the Class Representatives to implement the Parties' settlement in accordance with the Settlement Agreement. Settlement Class Counsel (for settlement purposes only) are: Elaine A. Ryan; Stewart M. Weltman, and; Jeffrey I. Carton. Plaintiffs and Class Counsel must fairly and adequately protect the Class' interests.
4. The court expressly reserves the right to determine, if necessary, whether the Named Plaintiffs' proposed claims may be certified as a class action for purposes other than settlement, and Defendants

1 hereby retain all rights to assert that the Named Plaintiffs'  
2 proposed claims may not be certified as a class action except for  
3 settlement purposes.

4 5. The court finds the proposed settlement is sufficiently fair,  
5 reasonable and adequate to warrant providing notice to the  
6 Settlement Class. This determination permitting notice to the  
7 Settlement Class is not final, but a determination that there is  
8 probable cause to submit the proposed Settlement Agreement to the  
9 Settlement Class and to hold a Fairness Hearing to consider the  
10 fairness, reasonableness, and adequacy of the proposed Settlement.

11 6. The court appoints KCC Class Action Services as Settlement  
12 Administrator in accordance with Section III Paragraph C of the  
13 Amended Settlement Agreement.

14 7. The court approves the Class Notice, the content of which is  
15 without material alteration from Attachment B to Exhibit 1 to the  
16 Declaration of Gina Intrepido-Bowden (ECF No. 81-6 at 53) and  
17 directs the Settlement Administrator to publish the Class Notice in  
18 accordance with the Settlement Class Notice Program provided for  
19 in the Declaration of Gina Intrepido-Bowen. (ECF No. 81-6).

20 8. Defendants will notify Class Members of the Settlement in the  
21 manner specified under Section VII of the Settlement Agreement.  
22 Defendant will pay all costs associated with claims administration  
23 and providing notice to Class Members. Within a reasonable  
24 amount of time before the filing date of Plaintiffs' application or  
25 motion in support of the Final Approval Order and Judgment,  
26 Defendants are to provide Plaintiffs with a declaration or  
27 declarations from the Settlement Administrator confirming that the  
28 notice has been provided in accordance with the Settlement

## Agreement.

- 2 9. The Settlement Administrator shall make available an electronic  
3 copy of this preliminary approval Order in a prominent location on  
4 the informational website. The Settlement Administrator shall  
5 include a statement, in a prominent location on the Class Notice  
6 and claims forms, informing putative class members that a copy of  
7 this Order is available on the informational website.
- 8 10. Class Members who want to receive a monetary settlement must  
9 accurately and completely fill out a Claim Form and submit it to  
10 the Claims Administrator within one hundred twenty (120) days  
11 from the date of this Order. Settlement Class Members who do not  
12 submit a complete and timely Claim Form in compliance with the  
13 Settlement Agreement shall not be entitled to any benefits under  
14 the Settlement, but nonetheless shall be barred by the Release and  
15 provisions of the Settlement Agreement and the Final Order and  
16 Judgment.
- 17 11. The court approves the creation and maintenance of the Settlement  
18 Class website that shall include, at a minimum, downloadable  
19 copies of the Class Notice, Claim Form and Settlement Agreement  
20 and shall be maintained in accordance with terms of the Settlement  
21 Agreement.
- 22 12. The court orders any members of the Settlement Class who wish to  
23 exclude themselves from the Settlement Class to submit  
24 appropriate, timely requests for exclusion in accordance with the  
25 procedures outlined in the Settlement Agreement and Class Notice,  
26 postmarked no later than one hundred twenty (120) days from the  
27 entry of this Order, or as the court may otherwise direct, and sent  
28 to the Settlement Administrator at the address on the Class Notice.

1 13. The court orders that any member of the Settlement Class who does  
2 not submit a timely, written request for exclusion from the  
3 Settlement Class (i.e. become an Opt-Out) on or before one hundred  
4 twenty days (120) days from the entry of the Order will be bound by  
5 all proceedings, orders and judgments in the litigation, even if such  
6 Settlement Class Member has previously initiated or subsequently  
7 initiates individual litigation or other proceedings encompassed by  
8 the Release (as set forth in Section II Paragraphs Z-CC of the  
9 Settlement Agreement).

10 14. Class Members who have not submitted a timely written exclusion  
11 request pursuant to this Order who want to object to the  
12 Settlement Agreement must file a written objection and/or Notice of  
13 Intention to Appear with the court, and serve copies on Class  
14 Counsel and Defendants' Counsel no later than one hundred twenty  
15 (120) days after the date of this Order. The Objection must state:  
16 (a) the Settlement Class member's full name, address and  
17 telephone number; (b) a signed declaration that he or she is a  
18 member of the Settlement Class and purchased Covered Product(s);  
19 (c) a written statement of all grounds for the objection; (d) a  
20 statement of whether the objector intends to appear at the Fairness  
21 Hearing; and (e) if the objector intends to appear at the Fairness  
22 Hearing through counsel, the objection must also identify the  
23 attorney representing the objector who will appear at the Fairness  
24 Hearing. Any response to an objection shall be filed with the court  
25 no later than seven (7) days prior to the Fairness Hearing.

26 15. The court orders that any attorney hired by a Settlement Class  
27 Member for the purpose of objecting to the proposed Settlement, the  
28 Attorneys' Fee Award or the Incentive Award and who intends to

1 make an appearance at the Fairness Hearing to provide to the  
2 Settlement Administrator (who shall forward it to Settlement Class  
3 Counsel and Defendants' Counsel) and to file with the Clerk of  
4 Court a notice of intention to appear no later than one hundred  
5 twenty (120) days from the entry of this Order or as the court may  
6 otherwise direct. Counsel who do not adhere to these requirements  
7 will not be heard at the Fairness Hearing.

8 16. Any Settlement Class Member who does not file a timely written  
9 objection to the Settlement or who fails to otherwise comply with  
10 the requirements of Section VII Paragraph C of the Amended  
11 Settlement Agreement shall be foreclosed from seeking any  
12 adjudication or review of the Settlement by appeal or by any other  
13 means.

14 17. The Settlement Administrator shall establish a post office box in  
15 the name of the Settlement Administrator to be used for receiving  
16 requests for exclusion, and any other communications, and  
17 providing that only the Settlement Administrator, Settlement Class  
18 Counsel, Defendants' Counsel, the court , the Clerk of Court and  
19 their designated agents shall have access to this post office box,  
20 except as otherwise provided in the Settlement Agreement.

21 18. The court directs that Settlement Class Counsel shall file their  
22 applications for the Attorneys' Fee Award and Named Plaintiffs'  
23 Incentive Award one hundred ten (110) days from the entry of this  
24 Order in accordance with the terms set forth in Section VI  
25 Paragraph A of the Settlement Agreement.

26 19. The Settlement Administrator shall compile a list of all Class  
27 Members who timely send a written request to be excluded from the  
28 settlement and provide a copy of that list to Class Counsel ten (10)

1       calendar days after the Opt-Out Date, and then file with file with  
2       Court the Opt-Out List with an affidavit attesting to the  
3       completeness and accuracy thereof no later than five (5) days  
4       thereafter or on such other date as the Parties may direct.

5       20. If the Settlement Agreement terminates by its terms for any  
6       reason, the following will occur: (a) this Order will be vacated; (b)  
7       class certification will automatically be vacated; (c) Plaintiffs will  
8       stop functioning as class representatives and Class Counsel will  
9       revert to interim class counsel; (d) this Action will revert to its  
10      previous status in all respects as it existed immediately before the  
11      Parties executed the Settlement Agreement; and, e) no reference to  
12      the Settlement Class, the Settlement Agreement, or any  
13      documents, communications, or negotiations related in any way  
14      thereto shall be made for any purpose in the litigation or in any  
15      other action or proceeding.

16       21. Neither the Settlement Agreement, nor any of its provisions, nor  
17      any of the documents (including but not limited to drafts of the  
18      Settlement Agreement, this Preliminary Approval Order or the  
19      Final Order and Judgment), negotiations, or proceedings relating in  
20      any way to the Settlement, shall be construed as or deemed to be  
21      evidence of any admission or concession by any person, including  
22      Schiff, and shall not be offered or received in evidence, or subject to  
23      discovery, in this or any other action or proceeding except in an  
24      action brought to enforce its terms or except as may be required by  
25      law or Court order.

26       22. All discovery and pretrial proceedings and deadlines are stayed and  
27      suspended until further notice from the court, except for such  
28      actions as are necessary to implement the Settlement Agreement

1 and this Order.

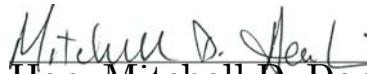
2 23. The court directs that settlement class counsel shall file their  
3 applications for the Attorney's Fee Award and Named Plaintiffs'  
4 Incentive Award fourteen (14) days prior to the date set for final  
5 approval of the Settlement and Settlement Agreement.

6 24. The Court reserves the right to adjourn or continue the Fairness  
7 Hearing, or any further adjournment or continuance thereof,  
8 without further notice other than announcement at the Fairness  
9 Hearing or at any adjournment or continuance thereof, and to  
10 approve the Settlement with modifications, if any, consented to by  
11 the Settlement Class Counsel and Defendants' Counsel without  
12 further notice.

13 25. Final Approval Hearing. A Final Approval Hearing shall be held  
14 before this court on **April 8, 2015, at 10:00 a.m. in Courtroom 1E**  
15 **in the Edward J. Schwartz Federal Courthouse, 221 W.**  
16 **Broadway, San Diego, CA, 92101.**

17 IT IS SO ORDERED.

18  
19 DATED: November 21, 2014

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21   
22 Hon. Mitchell D. Dembin  
U.S. Magistrate Judge

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